Noah's Bay Area Bagels, LLC *and* United Food and Commercial Workers Union, Local 870, AFL–CIO. Cases 32–CA–16086 and 32–CA–16244

May 22, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On January 22, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent, the Charging Party, and the Acting General Counsel filed exceptions, supporting briefs, and answering briefs, and the Respondent and Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order as modified.[2]

1. We adopt the judge's recommendation to dismiss the allegation that Store Manager Love unlawfully warned employee Smith about Smith's distribution of union literature at the conclusion of the Respondent's meeting with employees on April 15, 1997.[3] We find, in agreement with the judge, that Smith was distributing the literature in a work area, inside the store, and thus, in an area in which the Respondent could properly prohibit such conduct on a nondiscriminatory basis. See, e.g., *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). There is no evidence that Love's warning to Smith was discriminatory. In light of the above, we find it unnecessary to pass on whether Smith's distribution was also conducted during working time.

We disavow the judge's statement, in the penultimate paragraph of section II,B of her decision, that "[i]t is undisputed [that the] Respondent has a valid no-solicitation rule in its employee handbook." The General Counsel has not alleged, and indeed has expressly declined on the record to litigate in this proceeding, whether Respondent's no-solicitation/no-distribution rules, as published in the Respondent's employee handbook, are facially valid or invalid.

2. For the reasons fully set forth in sections II,C and III,B,1 of the judge's decision, we affirm her finding and conclusion that Respondent's Chief Executive Officer Mizes' comments to employees during a captive audience speech on April 15 constituted an unlawful threat that the employees would be deprived of existing benefits if they selected the Union to represent them. The credited testimony is that Mizes told the assembled employees, while motioning toward the floor with his arm and touching it with his hand, that:

> [I]f we go through the whole union process, when it [comes] down to negotiations, we [are] going to start from zero. . . . [Y]ou can get the same, better, or worse. But . . . we're going to start from zero.
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> . . . .
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> [T]he union had no place in Noah's . . . it would ruin the relationship between the employees and the management if the union would come in. . . . [W]e would have to start from the ground up. Everything would have to be negotiated, from pay to policies. He tapped the ground with his hand. He said from the ground up.
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> . . . .
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> [W]e would start from zero and he touched the floor with his hand. He was in a sitting position and he indicated we would start from scratch or ground zero in our negotiations.

Our dissenting colleague relies at least in part on the undisputed fact that Mizes did not actually *tell* anyone that the Respondent was going to reduce their wages and benefits. But our disagreement with our colleague is over the reasonable implications of what Mizes *did* tell the employees. We find, in agreement with the judge, that the attendees at the April 15 meeting could reasonably believe from Mizes' remarks and gestures that they would suffer a loss in wages and other benefits as a direct result of selecting the Union, rather than as a possible outcome of good-faith bargaining between the Respondent and the Union.

In his dissent, our colleague relies on *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228 (5th Cir. 1996), denying enf. 317 NLRB 675 (1995); and *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989), denying enf. 289 NLRB 844 (1988), on remand 303 NLRB 382 (1991). Even if we were to accept the reasoning of those circuit court decisions, both of which reversed the Board's unfair labor practice findings, they are nevertheless distinguishable from the instant case. In *Exxon*, the Board found that the employer violated the Act by refusing to bargain with the union about intended changes to the employees' savings, investment, and loan plan (the plan); by thereafter unilaterally implementing the changes to the plan; and by threatening employees that the union's bargaining relationship with the employer would be damaged and that the employees would lose current benefits if the union continued to try to get the employer to bargain about the changes to the plan. Specifically, the employer told the employees that if the union persisted in trying to get the employer to bargain about the changes to the plan, the employer would insist that any such bargaining "begin with a blank sheet of

[1] No exceptions were filed concerning the judge's findings that the Respondent violated Sec. 8(a)(1) by questioning the shift leaders about their union activities and those of other employees and by instructing the shift leaders to stop the union activities of other employees. In addition, no exceptions were filed regarding the judge's finding that the record did not establish unlawful interrogation by Store Manager Love on April 15, 1997.

[2] We modify the judge's conclusions of law, recommended Order, and notice to more closely reflect the violations found.

[3] All dates are 1997 unless otherwise stated.

paper." 317 NLRB at 679–680; 687–688. The court reversed all of the Board's unfair labor practice findings. The court then found that the "begin with a blank sheet of paper" remark was not unlawful, because it was "made in circumstances free from other unfair labor practices." Nor was it "coupled with other statements or company conduct that would suggest to a reasonable audience that the companies intended to eliminate benefits before bargaining." 89 F.3d at 233.

By contrast, in this case, Mizes' remarks *were not* made in circumstances free from other unfair labor practices. Rather, they were made less than 2 weeks after Store Manager Love's unlawful April 4 questioning of employee shift leaders about their union activities, and his ordering them to prohibit other employees from engaging in union activities and to report any such activities to him; only 4 days after the Respondent's unlawful April 11 announcement (discussed more fully in the following section) that it was not going to restore the health benefits plan to the unit employees; and only a month before the Respondent's eventual unlawful May 19 failure to restore the health benefits plan to the unit employees. Second, Mizes' remarks here *were* coupled with conduct—his gestures toward and touching of the floor—that would certainly convey the message that the employer intended to eliminate benefits before bargaining. Accordingly, even under the court's analysis in *Exxon*, Mizes' remarks here would be found unlawful.

In *Shaw's Supermarkets*, the Board found that the respondent violated the Act when it told its employees that if the union won the election, the "employees would be guaranteed minimum wages and workmen's comp[ensation] and that's where our collective bargaining process would begin," and that "we would start with minimum wages and workmen's comp[ensation] and build from that point." The court denied enforcement of the Board's order and remanded the proceeding to the Board.[4] The court particularly noted that the Board had found no other violations of the Act by the respondent, 884 F.2d at 36, whereas in almost all the similar cases reviewed by the court the Board had expressly relied on the fact that the employers had also committed other serious unfair labor practices. 884 F.2d at 40. Indeed, the court particularly noted that the Board found in *Belcher Towing Co.*, 265 NLRB 1258 (1982),[5] that the respondent's statement that bargaining would start from "ground zero" violated the Act because it meant, "in the context of [several] other unfair labor practices," that if the union won the election the respondent would reduce benefits before the start of bargaining. Id. Here, of course, like the respondent in *Belcher Towing*, and unlike the respondent in *Shaw's Supermarkets*, the Respondent *has* committed other serious unfair labor practices. Thus, *Shaw's Supermarkets*, like *Exxon*, supra, is distinguishable from the instant case. And, as with *Exxon*, even under the court's analysis in *Shaw's Supermarkets*, Mizes' remarks here, made in the context of other unfair labor practices, would be found unlawful.

3. We affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by not restoring the Prudential health benefits plan (the Prudential plan) for the unit employees at the Respondent's Telegraph Avenue store (the Telegraph store) during the critical period preceding the June 13 representation election at that store.[6]

A. Applicable Principles

Our dissenting colleague claims that Board precedent regarding the propriety of granting or withholding of benefits during the critical period before an election is inconsistent and fails to provide adequate guidance to employers that are attempting to comply with the requirements of the Act. We disagree. The law in this area is clear. In *Lampi, L.L.C.*, 322 NLRB 502 (1996), the Board recited the following standard in *United Airlines Services Corp.*, 290 NLRB 954 (1988), for determining whether conduct involving the grant of benefits is objectionable:

> It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. [Id. at 502; citations omitted.]

Further, while an employer is not permitted to tell employees that it is *withholding* benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be *deferred* until after the election—regardless of the outcome.[7] These are comprehensible standards and guidelines for employer conduct during the critical period prior to a representation election.[8]

[4] On remand, the Board, while accepting the court's determinations as the law of the case, nevertheless expressed its continued disagreement with the court's conclusions. 303 NLRB 382 (1991).

[5] *Belcher Towing* was relied on by the judge in the instant case.

[6] The Respondent has over 120 stores in California, Oregon, and Washington. The representation election, however, involved only the Telegraph store.

[7] See, e.g., *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995).

[8] As discussed below, we find, contrary to the judge, that the Respondent has established a legitimate business reason for restoring the

B. Facts

In January 1997 the Respondent's parent company decided to change the Respondent's health benefits from the Prudential plan to the General American plan. Most of the Respondent's employees considered the General American plan to be much less desirable than the Prudential plan, and believed that the change would result in a diminution of their benefits. The upcoming change was announced on February 5. Almost immediately thereafter, the Respondent's managers began trying to persuade the parent company to restore the Prudential plan. The change became effective on April 1, just a few days prior to the Union's April 4 filing of its petition to represent the employees in the single-location Telegraph store unit, and thus, just prior to the start of the critical preelection period.

Following the implementation of the General American plan, the employees made the Respondent aware of their dissatisfaction with it, and of their desire to return to the Prudential plan. By about April 10 the Respondent's managers were able to persuade their superiors in the parent company to implement new benefits for the Respondent's employees, similar to those encompassed in the Prudential plan. On April 11 the Respondent announced to all of its employees except those in its six East Bay district stores (including the Telegraph store) that the Prudential plan was going to be restored.[9] The Respondent notified the East Bay district store employees that the Respondent was "not able to make this change for those crew members who may be covered by a pending National Labor Relations Board case." The Respondent told those employees that:

> We regret that no change can be made for you at this time. We have been advised by our lawyer that any changes for crew members who may be involved in the NLRB case would create legal risk at this time. The law is quite clear that we are not allowed to change wages, benefits, or do anything else that could be considered "buying" your votes in a possible election. Please understand that we have taken this action solely to avoid any risk of improper influence on any upcoming election. We will give you further information as soon as our situation with the NLRB becomes clear.

On May 19, after the Regional Director ordered an election at the Telegraph store only, the Respondent restored the Prudential plan to the employees of all but the Telegraph store.

C. Analysis and Conclusions

We affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by not restoring the Prudential plan for the unit employees at the Telegraph Avenue store during the critical period.

Contrary to the judge, however, we do find that, based on the unusual and exigent circumstances confronting the Respondent at the same time that the Union was filing its petition to represent the Telegraph store employees, the Respondent has established a legitimate business reason for restoring the Prudential plan on a companywide basis at *all* of its stores—*including* the Telegraph store—during the critical period prior to the election. Thus, the parent company announced the change in health benefit plans about 2 months before the April 4 filing of the representation petition. Immediately following the announcement of the change, the Respondent began attempting to persuade its parent company to restore the Prudential plan. The actual April 1 implementation of the change, and the accompanying companywide expressions of employee distress about the loss of the Prudential plan, began just a few days before the start of the critical period. Given the importance of employee confidence in their health care insurance and benefit plan, the urgent expressions of companywide employee distress over their loss of the Prudential plan, and the reasonable prospect of at least some weeks passing before the finalization of the representation proceeding,[10] we find that the Respondent has presented a persuasive business reason for immediately announcing the restoration of Prudential plan benefits companywide as soon as it received permission from the parent company on April 10 to restore such benefits. Thus, we find that the Respondent has established that the timing of the announcement and implementation of the restoration of Prudential plan benefits was governed by factors other than the union campaign.[11]

Prudential plan on a companywide basis to *all* of its stores, including the Telegraph store, during the critical period prior to the election. Our dissenting colleague, however, points to our disagreement with the judge, and also to what he asserts is the Respondent's inability to have predicted with any assurance that we would find in its favor, as proof that the above standards and guidelines themselves are not clear and comprehensible. We cannot agree that a disagreement between the Board and a judge over the ultimate result to be reached from the application of a standard or guideline to a particular set of facts proves that the standard or guideline itself is incomprehensible or even unclear.

[9] At this time, in the representation proceeding, the Respondent and the Union were still disputing whether the single-location Telegraph store unit petitioned for by the Union was an appropriate unit, or whether, as contended by the Respondent, a multilocation unit composed of all six of the East Bay district stores was appropriate. In May, the Regional Director ultimately determined that the petitioned-for single-location Telegraph store unit was appropriate, and directed that an election be conducted in that unit in June. The Union received a majority of the votes, and was thereafter certified as the representative of the unit.

[10] The election was ultimately held about 2-1/2 months later, on June 13.

[11] Cf. *Adams Super Markets*, 274 NLRB 1334 (1985) (announcement of new a medical insurance plan during critical period not unlawful where a new chief executive officer took command 1 month before filing of representation petition, and, in response to frequent employee complaints about existing medical insurance plan, received authorization from board of directors 2 weeks before the critical period to proceed with a new medical insurance plan as quickly as possible; implementation of new a plan during the critical period, rather than delaying until after the election, found not to have been motivated by union campaign but instead to have been economically justified by fact that a new plan, unlike the former self-insured plan, placed cap on employer's liability).

We find, however, in agreement with the judge, that the Respondent unlawfully withheld restoration of the Prudential plan at the Telegraph store while at the same time lawfully restoring it at all of its other stores,[12] without providing the Telegraph store employees with assurances that the withholding of the Prudential plan at that store was only temporary and that it would be restored retroactively to them following the election, regardless of its outcome.[13] We do not agree with our colleague that the Respondent's expression of regret to the Telegraph store employees that the Prudential benefits could not be restored to them "at this time," coupled with its promise that it would give them "further information as soon as our situation with the NLRB becomes clear," constitutes an assurance that these benefits would nevertheless be restored to them retroactively following the election, regardless of its outcome.

We also do not agree with our colleague that if the Respondent *had* restored the Prudential plan to the Telegraph store at the same time it was restoring it to all of its other locations, it would have run afoul of precedent holding that it is unlawful for an employer to grant benefits while an election is pending unless the employer can establish that the benefit had been planned prior to the union's arrival on the scene, or that the grant of the benefit was part of an established past practice. An employer in circumstances such as those confronting the Respondent here may prove that it acted lawfully by establishing that there was a persuasive business reason demonstrating that the timing of the announcement or grant of benefits was governed by factors other than the union campaign. Such a persuasive business reason, like the one presented by the Respondent here, is not necessarily limited to an established past practice or even a course of conduct that was planned prior to the advent of the union on the scene.

Sears, Roebuck & Co., 305 NLRB 193 (1991), relied on by our colleague in this context, does not hold to the contrary. There, the Board found that the employer announced and implemented a district-wide incentive program (including at the particular facility where a representation election was pending) because of the election campaign. Here, on the other hand, the Respondent has persuasively demonstrated that it restored the Prudential plan at all of its stores companywide without regard to the election campaign at the Telegraph store. But just as persuasively, the record establishes that the Respondent singularly *failed* to restore the plan at the Telegraph store because of the pending election, without assuring the Telegraph employees that it *would* restore this plan at that store following the election, regardless of the outcome.

[12] See *Modesto Convalescent Hospital*, 235 NLRB 1059 (1978), enfd. 624 F.2d 192 (9th Cir. 1980) (employer unlawfully withheld across-the-board wage increases from unit employees at its facility where objections to election were pending, while at the same time granting such increases at all its nonunion facilities). Cf. *Stanley Smith Security*, 270 NLRB 225 (1984) (representation case; election results will not be set aside where increase in benefits results from corporate-wide decision and is implemented corporatewide in a normal business fashion).

[13] See *Kauai Coconut Beach Resort*, supra.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 3 and 4, respectively.

"3. By questioning employees about their union activities and the union activities of other employees; instructing employees to stop the union activities of other employees; and threatening employees that, if they selected the Union as their collective-bargaining representative, bargaining would 'start at zero' and/or 'from the ground,' in a manner that suggested that they would lose benefits because of their support of the Union, the Respondent has violated Section 8(a)(1) of the Act.

"4. By withholding medical and other benefits from the Telegraph store employees, in order to discourage union support and induce employees to vote against the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Noah's Bay Area Bagels, LLC, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b), respectively.

"(a) Questioning employees about their union activities and the union activities of other employees; instructing employees to stop the union activities of other employees; and threatening employees that, if they selected the Union as their collective-bargaining representative, bargaining would 'start at zero' and/or 'from the ground,' in a manner that suggested that they would lose benefits because of their support of the Union.

"(b) Withholding medical and other benefits from the Telegraph store employees, in order to discourage union support and induce employees to vote against the Union."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER BRAME, dissenting in part.

I agree, for the reasons stated in the majority opinion, that Store Manager Sean Love's remarks regarding employee Joshua Smith's distribution of union literature were not unlawful. Contrary to my colleagues, however, I would reverse the judge and find that the Respondent did not violate Section 8(a)(3) and (1) by failing to restore the former medical benefits plan to employees at the Telegraph Avenue store prior to the election, or violate Section 8(a)(1) through Chief Executive Officer Jim Mizes' statement that bargaining would "start from zero."

In characterizing its dilemma regarding the restoration of the health benefits as a "Hobson's choice," the Respondent, in my view, accurately pointed out a perplexing inconsistency in Board precedent regarding the granting or withholding of benefits during the period when a representation petition is pending. In my view, it is essential that the Board re-examine this area of the law in order to provide assistance to the majority of employers that are legitimately attempting to comply with the Act's requirements. In this regard, I would find that an employer acts unlawfully when it manipulates the granting or withholding of benefits with the purpose of interfering with employee free choice in the election, as detailed below. In this case, I would find that the record suggests no such manipulation.

The facts here are undisputed. The Respondent's new parent company, Boston Chicken, decided in January 1997[1] and announced the next month that, effective April 1, the Respondent's employees would receive the General American health benefits plan that covered other Boston Chicken employees, rather than the Prudential plan in which they were then enrolled. As scheduled, the change took place on April 1, 3 days before the Union filed its petition in this proceeding. Employees at the Respondent's stores immediately voiced their complaints about the new plan, which they viewed as a reduction in benefits, and the employees at one location even refused to enroll in it.

The Respondent's managers, who had anticipated the employees' dissatisfaction and had already argued to the parent company that the change would be detrimental, redoubled their efforts and finally, about April 10, persuaded their superiors to restore benefits comparable to the Prudential plan. The following day, the change was announced to employees, except for the employees of the East Bay district stores, which the Respondent was then asserting to be the appropriate bargaining unit in the Board preelection proceeding. Those employees received a letter stating:

> Noah's has decided to offer a choice of benefit plans by reinstating its prior medical, dental, and vacation plans to Noah's crew members. Unfortunately, we are not able to make this change for those crew members who may be covered by a pending National Labor Relations Board case. We have sought to restore benefits for some time, and we are now able to announce the change.
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> We regret that no change can be made for you at this time. We have been advised by our lawyer that any changes for crew members who may be involved in the NLRB case would create a legal risk at this time. The law is quite clear that we are not allowed to change wages, benefits or do anything else that could be considered "buying" your votes in a possible election.
>
> Please understand that we have taken this action solely to avoid any risk of improper influence on any upcoming election. We will give you further information as soon as our situation with the NLRB case becomes clear.

After the Regional Director determined that a single-location unit at the Telegraph store was appropriate, the Respondent restored the previous benefits to the employees at all of the other East Bay district stores. Only the Telegraph store employees remained under the General American plan.

The judge and my colleagues rely on precedent that requires employers to act without regard to the organizing campaign,[2] and fault the Respondent for failing to restore the Prudential benefits to the Telegraph employees on the basis of the pending union petition. However, if the Respondent had instead restored the benefits, in response to its employees' dissatisfaction, that decision would have run afoul of another line of precedent, holding that preelection changes that are not a matter of routine practice violate Section 8(a)(1), unless the change had been decided on and announced before the petition was filed.[3] In my view, it is arbitrary and unreasonable to find that *both* of these alternatives, granting the benefit and not granting it, violate the Act. Board precedent, however, does precisely that.

My colleagues contend that the Board standard is straightforward. They state that employers must simply behave as if the union were not present. Although, under the precedent they cite, the grant or announcement of a benefit during the critical preelection period gives rise to an inference that the employer is acting unlawfully, my colleagues note that an employer may rebut the inference "by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits."[4] The majority finds that the Respondent demonstrated a legitimate business justification for restoring the Prudential plan, on a company-wide basis including the Telegraph store, based on "the importance of employee confidence in their health plan, the urgent expressions of companywide employee distress over their loss of the Prudential plan, and the reasonable prospect of at least some weeks passing before the finalization of the representation proceeding." Therefore, the majority concludes, the Respondent could and should have restored the benefit to all employees, including those in the Telegraph unit.

[1] All dates are 1997 unless otherwise indicated.

[2] See, e.g., *Russell Stover Candies*, 221 NLRB 441 (1975); *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986), modified 294 NLRB 1 (1989).

[3] See, e.g., *Sears, Roebuck & Co*., 305 NLRB 193, 195–196 (1991), citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

[4] *Lampi. L.L.C.*, 322 NLRB 502 (1996).

One need look no further than the instant case to understand why an employer would take little comfort in the majority's application of what they consider a straightforward rule. In this very case, based on precisely the same facts and testimony, the judge determined that the Respondent "failed to demonstrate the need to implement the change during this time." The judge concluded that the Respondent acted unlawfully, not by failing to restore the Prudential plan to *all* employees, but by announcing the restoration as to *any* employees prior to the election. Certainly the Respondent could not have predicted with any assurance whether the Board would determine that restoration of the Prudential plan to all employees would be, as the majority finds, a business necessity based on urgent employee distress and the need for confidence in the health plan, or, as the judge suggested, a discretionary action undertaken to mollify unhappy employees while a representation election was pending.

As Judge Randolph commented in his dissent in *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 839 (D.C. Cir. 1998), a case that presented this issue in the context of a preelection wage increase,

> When a traffic light simultaneously blinks "Stop" and "Go" everyone knows repairs are needed. If a motorist encountering the light proceeds ahead while another motorist pauses, it is unimaginable that both would be guilty of failing to heed the signal. The Board's "law" governing pre-election wage increases approaches the unimaginable.

In my view, sound labor policy requires the Board to acknowledge the dilemma of well-meaning employers under current law and to provide guidance for identifying a viable and lawful course of action.

In *NLRB v. Otis Hospital*,[5] the First Circuit applied an approach that, in my view, satisfactorily protects the rights of employees in an election without rendering the employer powerless to make normal business decisions that may affect those employees. The court summarized the basic principles as follows:

> Withholding a wage increase during a union organizing campaign has been held to violate section 8(a)(1) of the Act under any of three conditions: if the increase was promised by the employer prior to the union's appearance; if it normally would be granted as part of a schedule of increases established by the employer's past practice; or if the employer attempts to blame the union for the withholding. The common rationale of these cases is that withholding a wage increase in these circumstances has the obvious effect of discouraging employees from exercising their right to organize and bargain collectively. On a similar theory, to grant benefits during a union organizing campaign has been held to violate section 8(a)(1) if, at the time, the employer knew or should have known that a union was organizing or that an election was pending, and if the benefits were granted with the purpose of interfering with the employees' rights to organize. [Citations omitted.]

The court concluded that neither the granting nor the withholding of benefits during an organizing drive is thus per se illegal; either course of conduct becomes unlawful "only if the employer is found to be manipulating benefits in order to influence his employees' decision during the union's organizing campaign."[6]

The Board has also analyzed the lawfulness of an employer's conduct based on whether the employer used manipulation to interfere with employee rights in an election. In *Aluminum Casting & Engineering Co.*,[7] the Board, relying on *Otis Hospital*, found that the employer violated Section 8(a)(3) and (1) by withholding a wage increase while election objections were pending. The Board found that the employer had a well-established practice of granting annual wage increases based on a wage survey. Although during the election campaign the employer had led employees to believe that they would receive the increase as usual, it failed to implement the increase, and later circulated leaflets indicating that the increase could not be granted because the union "stuck its nose in." The Board held that an employer may defer an increase, telling employees that the deferral is to avoid the appearance of election interference, but must be careful not to blame the union for the lack of an increase.

Similarly, in *Pennsylvania Gas & Water*,[8] the Board found a violation of Section 8(a)(3) and (1) when the employer granted a systemwide increase to all nonunit employees based on a periodic audit, but, on advice of counsel, did not grant the increase to employees involved in an election. The Board noted that the employer did not merely defer the increase and truthfully inform employees that its actions were designed to avoid the appearance of interference. Rather, the employer declined to grant the increase despite the union's express urging to do so. Moreover, the employer's purpose of gaining advantage in the election was revealed by a letter to unit employees, in which the employer addressed the increase and went on to urge the employees to vote against the union.

In contrast, the Board found in *Somerset Welding & Steel*[9] that an employer lawfully deferred a pay increase that it had informed a new employee he would receive after 30 days "if everything was going alright." Because the petition was filed during the 30-day period, the em-

[5] 545 F.2d 252 (1st Cir. 1976).

[6] Id. at 254–255.

[7] 328 NLRB 8 (1999).

[8] 314 NLRB 791 (1994), enfd. mem. 61 F.3d 895 (3d Cir. 1995).

[9] 304 NLRB 32 (1991), remanded on other issue 987 F.2d 777 (D.C. Cir. 1993), modified 314 NLRB 829 (1994).

ployer explained to the employee that the increase would be delayed because "everybody would think I'm buying votes off of you." The Board adopted the administrative law judge's reasoning that, despite the principle that the employer should act as if the petition had not been filed, the increase at issue would have been vulnerable to allegations of unlawful interference. Therefore, "fairness demands that the [e]mployer be privileged to withhold [an increase], provided that it does not utilize the incident as a means of combatting unionization by casting blame for the employee's loss upon the [u]nion, the Board or the election process." Id. at 47. Because the employer did not take the offensive by attributing blame and, in explaining the situation to the employee, remained noncommittal concerning what would occur after the election, the deferral was deemed lawful.

The Respondent here, clearly conformed to the standards for lawful action articulated and applied in these cases. The initial change to the General American plan, which had been previously announced, was implemented only days before the filing of the petition. Although the managers had foreseen a strong negative reaction to the change, their superiors had not. When vehement and widespread employee dissatisfaction resulted from the change, the Respondent reasonably concluded that an immediate response was necessary.[10]

The letter to the East Bay district employees clearly demonstrates that the Respondent here believed, in my view with good reason, that Board precedent prevented it from restoring the benefits to employees involved in the election. Therefore, the Respondent followed an approach previously employed and deemed lawful by the Board when it implemented changes to an employee handbook during an election campaign in another location:[11] it informed the employees that it could not lawfully change their benefits at that time, and that they would receive further information after the election. Like the employer in *Somerset Welding*, the Respondent did not seek to manipulate the employees' benefits for its own advantage in the election or cast blame on the Union for the temporary withholding of the Prudential plan at the Telegraph store. Although I agree with my colleagues that the Respondent violated the Act in other respects prior to the election, I would find that, in deferring the restoration of the Prudential plan, the Respondent acted prudently and in accordance with the precedent discussed above.[12] That the judge and my colleagues nonetheless find that the Respondent violated the Act, in my view, sharply illustrates that this aspect of the law has become a frustrating and futile maze for employers, and that serious reassessment by the Board and the articulation of clear guidance are needed.

Current Board precedent concerning Mizes' statement that negotiations would "start from zero" is not similarly ambiguous, and amply supports reversing the judge's finding of a violation. Under the precedent cited by the judge,

> "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends on what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.[13]

The Board and courts have thus recognized that "bargaining from scratch" or "bargaining from zero" statements are not per se unlawful. Rather, such statements "might, depending on the context, innocently represent a legal truth about how collective bargaining works." *Shaw's Supermarkets v. NLRB*, 884 F.2d 34 (1st Cir. 1989). In *Shaw's*, the court reversed the Board's determination that the employer's statement that employees were guaranteed minimum wage and workers' compensation and that was where bargaining would begin violated the Act. The court noted that the statement did not convey a threat to eliminate benefits prior to bargaining and was made in a context free of other unfair labor practices. Id. at 40. See also *Exxon Research & Engineering Co. v. NLRB*, 89 F.3d 228, 232–233 (5th Cir. 1996) (statement that bargaining would begin with a blank piece of paper not unlawful where circumstances did not suggest employer would eliminate benefits before bargaining).

In *Shaw's*, the court reviewed Board precedent demonstrating the importance of the factual context in this area. This precedent shows that the Board has found employer statements unlawful where they expressly threaten to

[10] Like my colleagues, I disagree with the judge's suggestion that, even when confronted by the employee protests, the Respondent could have delayed the change for all of its employees until after the election. Under some circumstances, decisions affecting employees cannot be delayed, even during an organizing campaign. Nor should the filing of an election petition at one of an employer's facilities require the employer to freeze terms and conditions of employment at all locations.

[11] See *Noah's New York Bagels, Inc*., 324 NLRB 266 (1997).

[12] I agree with my colleagues that the Respondent established a strong business justification for restoring the Prudential benefits to all employees, and I would find that, in accordance with the above precedent, the Respondent could lawfully have restored the benefits to the Telegraph employees under these circumstances. Unlike my colleagues, I do not find that the Respondent's statement in its letter to employees that "we will give you further information as soon as our situation with the NLRB case becomes clear," without specifying that the Prudential benefits would be restored regardless of the election's outcome, renders the withholding of the benefits unlawful. First, I note that the employer statement found lawful in *Somerset Welding* was similarly noncommittal. Second, I do not find that any particular formulation or "magic words" should be relied on to determine whether the employer is manipulating employee benefits. Such a determination, in my view, should be made by considering all of the relevant circumstances.

[13] *Noah's New York Bagels*, supra, 324 NLRB at 266, citing *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982).

rescind current wages or benefits in advance of bargaining, or occur in the presence of very serious unfair labor practices, such as discriminatory action against employee union organizers.[14] In contrast, similar statements do not violate the Act, but simply describe the realities of collective bargaining, when made in a context in which the employer has not demonstrated an intent to reduce wages or benefits prior to bargaining or to bargain in bad faith, or where the employer has not engaged in reprisals against union activists, even though it may have committed other less serious unfair labor practices.[15] Within this framework, whether the factual context of a "bargaining from scratch" statement is sufficiently threatening to render the statement unlawful is, of course, a matter of judgment to be determined on a case-by-case basis.

In the present case, five witnesses testified about Mizes' statement, variously quoting him as saying that "If we start bargaining, we are going to start from zero," that everything would have to be negotiated "from the ground up," that "everything was up for grabs," that "we would start from scratch or ground zero," and that "everything would start from the beginning, from the ground."[16] *Each witness*, however, went on to testify that in the same remarks Mizes further stated that bargaining could result in employees' getting more, less, or the same wages and benefits. In addition, the Respondent's campaign literature states that "It is possible that you could end up with lower, better, or the same wages and benefits than you currently have."

The Respondent clearly did not tell employees that it would at any time reduce their wages and benefits; it simply dispelled any misapprehension employees may have had that bargaining started with wages and benefits at their current levels. Thus, the Respondent honestly informed them that "everything was up for grabs" and that the outcome of negotiations was unpredictable. These statements by Mizes, viewed in context with his other remarks, conveyed to employees with reasonable accuracy the fundamental process of collective bargaining.

Moreover, I disagree with the majority's assessment of the context in which Mizes' statements occurred. In my view, Mizes' statements did not occur in the context of unfair labor practices like those in the cases cited by the *Shaw's* court in which "bargaining from scratch" statements were found unlawful. For the reasons discussed above, and contrary to my colleagues, I do not find that the Respondent violated the Act by deferring the restoration of the Prudential benefit plan to the unit employees. Thus, the only remaining unfair labor practice committed by the Respondent consisted of Manager Sean Love's questions to the shift leaders, under the mistaken belief that they were statutory supervisors, as to their knowledge of employee union activities, and his statements concerning what actions they were expected to take in support of the Respondent's opposition to the Union. These questions and statements did not provide a context of such coercion and reprisal in response to union activity that employees would reasonably understand Mizes' subsequent remarks as a threat to eliminate benefits before bargaining commenced. Therefore, I would find that Mizes' statements did not violate Section 8(a)(1).

[14] *Mississippi Chemical Corp.*, 280 NLRB 413 (1986) (express threat that bargaining would begin only after employees' wages and benefits were reduced, and employer had committed unfair labor practices including coercive interrogation; threats of discharge, other reprisals, and futility; discharge and other discrimination against primary union adherent; confiscation of union literature; and implementation of more onerous working conditions*); Fountainview Place*, 281 NLRB 26 (1986) (statement made after discriminatory transfer of principal union activist to less desirable position; employer also unlawfully threatened to discharge the same employee for supporting the union and discriminatorily transferred her to night shift); *Belcher Towing*, 265 NLRB 1258 (1982), affd. in relevant part 726 F.2d 705 (11th Cir. 1984) (statement found threat to reduce benefits before bargaining in context of employer's suspension of strong union advocate; denial of higher-paid work to another strong union supporter; surveillance and creation of impression of surveillance of union activities; interrogations; threats, including threat of discharge; promise of benefits; and maintenance of policies that employees covered by collective-bargaining agreements not eligible for certain benefit plans).

[15] See, e.g., *Clark Equipment*, 278 NLRB 498 (1986), overruled in part on other grounds *Nickles Bakery of Indiana*, 296 NLRB 927 (1989) (statement lawful where employer found to have threatened loss of benefits and other reprisal, interrogated employees, conducted surveillance of union activities, and interfered with Board processes); *Campbell Soup Co.*, 225 NLRB 222 (1976) (employer unlawfully denied wage increase to employee, coercively interrogated employee, promulgated and enforced overly broad no-solicitation/no-distribution rule, solicited grievances, and made implied promise of benefit); *Ludwig Motor Corp.*, 222 NLRB 635 (1976) (employer made implied threat of reprisal and threat of plant closure or relocation).

[16] I note that the credited testimony quoted by the majority represents three witnesses' individual versions of what they recalled Mizes saying. From these varied accounts, the judge made the following findings, "I find Mizes, on April 15, informed the employees bargaining would start from zero and/or from the ground, repeated the comment and emphasized it with gestures. I also find Mizes informed the employees collective bargaining could result in their receiving less, more or the same wages and other terms and conditions of employment."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT question you about your union activities and the union activities of other employees; instruct you to stop the union activities of other employees; or threaten you that, if you selected the Union as your collective-bargaining representative, bargaining would "start at zero" and/or "from the ground," in a manner that suggests that you would lose benefits because of your support of the Union.

WE WILL NOT withhold medical and other benefits from you, in order to discourage union support and induce you to vote against the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of rights guaranteed you by the Act.

WE WILL offer the Telegraph store unit employees the same medical and other benefits granted our other counterpersons, cooks, and other staff in similar positions or, if those benefits no longer exist, substantially equivalent benefits, without prejudice to your seniority or any other rights or privileges previously enjoyed, and make you whole for any loss of earnings and other benefits suffered as a result of the discrimination against you.

NOAH'S BAY AREA BAGELS, LLC

Daniel F. Altemus Jr., Esq., for the General Counsel.

Robert Leinwand, Esq. and *John C. Corcoran, Esq. (Littler, Mendelson)* of San Francisco, California, for the Respondent.

Joni Jacobs, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER**,** Administrative Law Judge**.** These consolidated cases were tried on October 7 and 8, 1997,[1] at Oakland, California. The charge in Case 32–CA–16086, was filed by the United Food & Commercial Workers Union, Local 870, United Food & Commercial Workers International Union, AFL–CIO–CLC (Union or Charging Party), on May 12, against Noah's Pacific, LLC f/k/a Noah's Bay Area Bagels, LLC aka Noah's Bagels (Respondent or Noah's). The charge in Case 32–CA–16244 was filed on July 21.[2] During the trial, the parties agreed to a settlement in Case 32–CA–16244. The General Counsel withdrew the allegations concerning this charge and those portions of the proceeding covered by the agreement were remanded to the Regional Director for Region 32 for compliance.

The complaint in Case 32–CA–16086, was issued by the Regional Director for Region 32 of the National Labor Relations Board on July 31. The consolidated complaint was issued September 19. The consolidated compliant, as amended, alleges Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. Principally, the complaint alleges Respondent violated Section 8(a)(1) of the Act by: (1) unlawfully questioning employees about their union activities and the union activities of other employees; (2) instructing employees to stop other employees from engaging in union activities; (3) informing employees if they selected the Union as their collective-bargaining representative, bargaining would start "from the floor"; (4) threatening an employee with discipline for distributing union flyers; and (5) interrogating an employee about his union activities. The complaint further alleges Respondent violated Section 8(a)(1) and (3) of the Act by offering to all of the employees in its East Bay district, with the exception of those employees employed at its Telegraph store, an optional benefit package.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts it could not offer the benefit package to the employees of its Telegraph store because they were in the midst of a union organizing campaign.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the complaint, as amended at hearing, I find it meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the production and retail sale of bagels and other food products at over 120 stores in California, Oregon, and Washington. One division of Respondent's operation is called the East Bay district, an area east of San Francisco, California. One store in this division is located on Telegraph Avenue, Berkeley, California. (Telegraph store). The Union started organizing the Telegraph store. At the times here material, the manager of the Telegraph store was Sean Love; Lisa Hennig was the East Bay district manager; Lorraine Morton, the regional manager; Nico Gallegos, human resources director and Hennig's boss; and, the chief executor officer was Jim Mizes. Mizes, Gallegos, Martin, and Hennig had left Respondent's employ at the time of this hearing.

In addition to a manager, the Telegraph store had two assistant managers, Damian Cooper and Krista Sears. The parties stipulated the manager and assistant managers are supervisors as defined in the Act. In addition to these managers, the Telegraph store has 12 to 15 employees. At the times here pertinent, the Telegraph store had about four shift leaders[4] as part of the regular crew of bakers and counterpersons. The shift leaders were Dylan Martin, Matias Wolanski, Fernando Cazares, and Bashair Allah.

Many of the background facts were the subjects of stipulations entered into by all parties to this proceeding. The Union filed a Representation Petition on April 4, 1997, seeking to represent a unit of employees at the Respondent's Telegraph store. Also on or about April 4, a representative of the Union, John Nunes, visited the Telegraph store and submitted to Love,

[1] All dates are in 1997 unless otherwise indicated.

[2] Respondent amended its answer to the consolidated complaint, to admit, among other matters, that the charges were timely filed.

[3] I specifically discredit any testimony inconsistent with my findings.

[4] The terms "shift manager" and "shift leader" were used interchangeably in the record. It is admitted shift managers are not supervisors as defined in the Act.

as Respondent's representative, a letter requesting the Union be recognized as the Telegraph store's employees collective-bargaining representative. Love declined the request and forwarded the Union's letter to his superior, Hennig. Hennig informed Love she was sending him some information he should share with his supervisors.

The filing of the representation petition resulted in the matter being set for hearing and a hearing was conducted in April. The parties further stipulated:

> The issue at that hearing was whether the unit sought by the Petitioner, which consisted of a single store facility, was appropriate or whether, as contended by Respondent, a unit consisting of Respondent's six East Bay district stores was an appropriate unit.

On May 15 the Regional Director issued a Decision and Direction of Election, finding a single unit consisting of the Telegraph store was an appropriate unit, and directed an election in that unit. That decision was not appealed. An election was conducted. A majority of the employees voted in favor of the petitioning Union. Respondent filed objections based on its assertions improper conduct affected the election and sought to set the election aside. The Regional Director for Region 32 issued a supplemental decision on July 14 overruling all the objections filed by Respondent. No exceptions were filed to the Regional Director's supplemental decision.

B . The April 4 Meeting with Love

Love called a meeting with three of the shift leaders in his office as a result of the Union's recognition request. Bashair Allah, Dylan Martin, and Fernando Cazares attended the mandatory meeting. Love announced he had received a request from the Union to represent the Telegraph store employees. According to Allah,[5] Love informed the three shift leaders:

> that we [are] not officially able to vote in any union activities because we were considered management crew, and that any information about the union was to either be taken or not passed out. The information was not to be on the floor during work hours unless someone was on their break and outside the store[.]
>
> Any information was, more or less, to be reported to Sean if he was not on the floor, if he was not able to see it himself. Because now that we were going to be unable to vote, we were supposed to take on a more active approach as manager to make sure that this information can be distributed on the floor. . . .
>
> That we were supposed to be on the side of Noah. We weren supposed to be part of the union. [6]

Cazares informed Love he believed he was incorrect, that shift leaders could vote in a representation election. Martin and Cazares discussed their favorable past experiences with unions and Love informed them his prior dealings with unions resulted in his dislike for unions. According to Allah: "Sean had, basically, given his disapproval of the union and us, more or less, wanting or inviting a union to have third-party presence between the employees and Noah's as an official entity." Love informed the three shift leaders that union literature and solicitation activities were:

> not supposed to be on the floor during business hours unless people were on their break and outside of the store. Any information that came from the union was to go directly to him. And that we weren supposed to take any information—that we weren['t] supposed to distribute and pass out any information. That we were supposed to be on the side of Noah's, or more or less part of the management squad or team.

The shift managers informed Love they were not supervisors near the end of the meeting. Love did not terminate the meeting immediately after he received this information. He did not immediately pause and consult with his superiors concerning the supervisory status of the shift leaders. Allah and Cazares had met with the Union prior to April 4 and understood they were not supervisors and could vote in a representation election. There is no evidence Love or any of Respondent's other managers knew if any of the shift leaders were active in the union organizing campaign at the time of this meeting. To the contrary, Love admitted he called the meeting under the mistaken belief the shift leaders were supervisors, and thus, were required to join Respondent in its campaign to defeat the union organizing effort. During the course of this meeting, Love was receiving by facsimile, information concerning the conduct of supervisors during an organizing campaign and related portions of this information to the attending shift leaders. Included in this information was a list of actions supervisors could and could not take, which Love read to the attendees.[7] Allah left the meeting before the other attendees.

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[5] I find Allah credible. He appeared forthright and his manner reflected he was attempting to give complete and accurate answers. He seemed to possess good recall about the portions of the meeting which interested him and candidly admitted he stopped paying attention when the others started talking about the pros and cons of unionization. I note Respondent admitted on brief Allah was a credible witness and Love admitted the correctness of most if not all of his testimony concerning this meeting.

[6] Love admitted he started the meeting by announcing to the shift leaders there was a union organizing campaign in the store, and they would not be able to participate in it because they are supervisors. He also admitted he instructed they were to look out for certain activities in the store such as the distribution of union authorization cards and any violations of store policy. Love could not recall if he asked the shift leaders to report to him any other violations of this policy or if he asked them to report any discussions they heard in the store about the Union. He also could not recall if he asked them whether they had signed any cards. Love admitted asking the shift leaders if they knew anything about the union organizing activity. Love acknowledged informing the attendees Respondent would not be receptive to the idea of union representation. Love did not directly refute most if not all Cazares' and Allah's testimony concerning his statements.

[7] Allah recalled Love said they could not threaten employees, they could not ask employees about their union status, could not spy on union activities and they could not make any promises. Allah testified:

> A. He [Love] was saying that we weren['t] supposed to do this, we weren't' supposed to do that. However, there were ways to access information if you wanted information—from that point on—I mean, he just put that out there like, okay, you can't do this, but you can do that, but it can be done.
>
> Q. BY MR. LEINWAND: So, he was telling you there were illegal ways to do some things and there are legal ways to do some things?
>
> A He was telling us from the point of—the way I understood what he was saying was that you should not go up to any employee and say this or do this or do that. However, people can ask you questions, you couldn't' ask questions and those questions that people ask you, answers can come out from either side which can be helpful or not helpful to the union or Noah's or whatever.

Much of Allah's and Love's testimony was corroborated by Cazares. At the beginning of the meeting, Love informed the shift leaders a union organizing effort was occurring in the store and he was awaiting "some faxes that were coming through from a law firm with instructions of what to instruct us on what to do in that situation." While waiting for the information, Love asked the shift leaders "if we had any knowledge of this unionization that was taking part at the store." The shift leaders did not respond to this question.

Cazares recalled Love next asked the shift leaders:

> if anyone had approached us to fill out the small union card. Again, no one answered to that. The fax was coming in while he was asking these questions. I recall him telling us that such things should not be tolerated at the store. If we were to see anyone speaking or handing out any kind of pamphlet, to report it to me and to not allow it to take place in the store.
>
> I remember me asking him if there was any place in the store that was allowed to speak about unionization, for example, the breakroom. We had a little sofa there. And he said that he was going to have the sofa removed from the store so there wouldn't be any more breakroom, if it came down to that. That's pretty much it.[8]

I credit this testimony of Cazares. He appeared candid and displayed good recall.[9] When afforded the opportunity to tailor his testimony so it would be unfavorable to Respondent, he did not take advantage of the situation. For example:

> Q. Was there any discussion about how you or any of the other two felt about the union?
>
> A. I don't' recall.

This testimony is also consistent with Allah's admittedly credible evidence. It is highly probable Love, consistent with his statement Respondent would not allow any union organizing activity in the store; said "[t]hey could do anything they want outside, but not in the store," and included the breakroom as a no solicitation, no distribution area, in his response to Cazares' question. That Allah failed to mention this comment does not discredit the testimony. Allah admittedly left before the others and the comment may have been made when he was absent or during the time he admittedly stopped listening.

I also credit Cazares' testimony Love told them "that management did not tolerate unions and that we were supposed to back up management, be against the union." Cazares further testified Love informed them "he left his previous job because they were beginning to unionize and he didn't' want to tolerate that." Cazares testified on cross-examination as follows:

> Q. And he told you that absolutely no union activity would be tolerated, correct?
>
> A. Correct.
>
> Q. And that you should put a stop to it absolutely if you saw it?
>
> A. To report it and put a stop to it, yes.
>
> Q. And he said employees should not be passing out union materials on the floor, correct?
>
> A. Correct.

Love's testimony is not credited unless it is believably corroborated or constitutes an admission against Respondent's interests. He did not appear to be open and forthright. He appeared unduly nervous. He admitted to not recalling if he made many of the statements attributed to him by Cazares and Allah. On occasion he attempted to volunteer information and cast his responses in a light most favorable to Respondent's cause rather than replying directly to a question.

It is undisputed Respondent has a valid no-solicitation rule in its employee handbook and there is no evidence it was disparately applied. There was no evidence concerning solicitation and distribution of any other materials or matters in the breakroom. The amended complaint does not claim Respondent had or implemented an unlawful no-solicitation rule.

While Cazares admitted to being very active in the union organizing campaign, the nature and extent of the other shift leaders involvement in the campaign was not clearly presented. Thus, I find, at the time of this meeting, the employee attendees were not open union activists. Moreover, Respondent does not claim, and there is no basis to find Love's actions in admitting his error in considering the shift leaders supervisors constituted mitigation. There is no basis to conclude Respondent, by Love or other representatives, effectively repudiated Love's coercive statements. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); *United States Service Industries,* 324 NLRB 834 (1997).

C. April 15 Meeting

As discussed in greater detail below, Respondent was purchased in 1996 by Boston Chicken and, on April 1, revised, as here pertinent, its employees medical benefits to that offered Boston Chicken employees. The great majority of Respondent's employees considered the revision as a diminution of benefits. On or about April 9 or 10, Respondent notified most of its employees the

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[8] On cross-examination, Cazares consistently testified, as follows:

> Q. Okay. Going back to that meeting, staying on that meeting, you stated that Mr. Love told you that he would take out the couch from the room?
>
> A. Yes, from the breakroom.
>
> Q. And why did Mr. Love say that?
>
> A. So there wouldn't be any breakroom or any area where employees would be able to speak about union issues.

Cazares immediately admitted he did not reference these comments in his affidavit and that his memory was clearer at the time he gave his affidavit. Such admissions, in the circumstances of this case, do not require discrediting his testimony. The nature and circumstances of Cazares giving his affidavit were not explored. Whether the information contained in the affidavit was restricted by the nature of the questions asked of him or other circumstances were matters not adduced on this record. Thus, Cazares' candid admissions concerning his affidavit are reasons to credit, not discredit, his testimony.

Supporting this conclusion is Cazares' admission his affidavit did not include mention of his informing Love that shift leaders are not supervisors and could vote in the representation election. Allah and Love corroborated Cazares' testimony on this point. Thus, the failure of Cazares' affidavit to include the breakroom reference as well as his statement shift leaders are not supervisors do not provide grounds to discredit his testimony.

On April 5, after Love consulted with Respondent's corporate office and learned the shift leaders were correct in their assertion they were not supervisors and were eligible to vote in the representation election, Love informed the shift leaders they were correct in their assertions. Love did not retract, modify, or moderate any of his other comments.

[9] Respondent's arguments concerning Cazares' credibility are unpersuasive regarding this testimony. Love did not explicitly refute Cazares' claim he made this statement. Respondent also requested an adverse inference be drawn from the General Counsel's failure to call Martin as a witness. I find the request to be without merit. Martin was equally available to all parties in this proceeding. There was no compelling predicate advanced to warrant the taking of such an inference.

"old," more favorable, benefits would be available to them. The Telegraph store employees were informed such reinstated benefits would not be available for them.

After this announcement about the benefits, Respondent conducted the first in a series of mandatory employee meetings after hours at the Telegraph store. The employees were informed the meeting was to be conducted on April 15, between specific hours, ending about 9 p.m. The meeting, admittedly related to the union organizing campaign, was attended by the Telegraph store crew, plus Mizes, Hennig, Martin, and Love.[10] Mizes led the meeting discussing exclusively union-related matters.

One of the attendees, Matias Wolansky, a shift leader, recalled Mizes saying, while motioning to the ground[11] "that if we do go through the whole union process, when it came down to negotiations, we were going to start from zero." Wolansky also recalled Mizes saying unionization "was going to affect our friendliness and the ability to speak to management in an open way." Mizes made the comment about negotiations "starting from zero" at least twice during the course of the meeting.[12] At some point, Mizes also informed the assemblage "[Y]ou can get the same, better or worse. But, he said we're going to start from zero."[13] Wolansky appeared to be attempting to accurately recall Mizes' statements during this meeting and his testimony is credited.

Cazares also exhibited good recall of Mizes's statements. According to Cazares, whose testimony on this point I find credible based on his open and direct mien:

> [Mizes] spoke good about the union at first. He said that unions were good at one time in history. And that it helped the labor force, I guess the beginning work force. But then, the union members have declined and the unions were recruiting more members to get more dues. He said they didn't' have a place for a union.
>
> Noah's was all a family and that the union had no place in Noah's, that it would ruin the relationship between the employees and the management if the union would come in. And he said that we would have to start from the ground up. Everything would have to be negotiated, from pay to policies. He tapped the ground with his hand. He said from the ground up. . . .
>
> He wanted to know how we felt about that—about being in the union. A lot employees stated that since we were purchased by Boston Chicken that it lost Noah's touch and benefit packages were changed. They were talking about different pay raises and vacations. They were taking all this stuff away from the employees. And with the union, we would have a voice as a work force at Noah's.

Cazares readily admitted Mizes said "Everything is up for grabs" and in collective bargaining you could end up with more or less or the same. The employees were paid by Respondent for the time they spent at this meeting.

In contrast to the General Counsel's witnesses who clearly recalled Mizes' statements at this meeting, Respondent called Martin, who admittedly did not have a clear recollection of Mizes' statements, engaged in surmise, and relied to some extent on written notes[14] rather than memory. In addition to admitting to poor recall, I noted she volunteered information; appeared to be testifying based on coaching rather than recall; and, key information was elicited through the device of leading questions. She admitted Mizes said "everything will start from the beginning, from the ground." After making this statement, according to Martin, Mizes then said "that bargaining would always result in getting something better, worse or the same."

Martin claims Mizes relied to some extent on a script. The record is not convincing Mizes closely followed the script or that the statements in question were read from or based on the script. Martin could not recall which portions Mizes read and which he made extemporaneously. The script does provide:

> If the union wins the election, the only thing that will happen is that Noah's and the union rep. will sit down and bargain in good faith on wages, hours and working conditions. We don't start from where we are . . . we start at ground zero, with a clean slate . . . *some things could be better, some could be the same, some could be worse than they are right now*. [Emphasis in original.]

The script has the dates April 15 and 17. The reason for the date April 17 on the script was not explained. Martin does not know if the copy introduced in evidence had been revised subsequent to the April 15 meeting. Accordingly, I find the document had not been shown to be probative of what Mizes actually said during the meeting; it may have been revised subsequent to the meeting.

Love recalled Mizes, several times during the meeting, made the following statement:

> [Mizes] said negotiations start from ground zero, and that you could end up with more or you could end up with less than what you have now, more than what you have now, or the same with what you have now.

About 15 minutes after the meeting was scheduled to end, Allah informed one or more attendees that he had to leave, got his bicycle and started to leave. Love ran after him and they had

[10] Love started the meeting by discussing a new coffee program. It was not uncommon for Respondent to hold afterhour meetings to discuss store business with crew members.

[11] Wolansky described Mizes' gesture as, while "sitting down and just kind of put his arm over the ground and said zero."

[12] Wolansky recalled Mizes indicated unions may be good for certain facilities but not for Noah's. Mizes discussed the history of Noah's and informed the employees:

> [W]e were a friendly company. We did not need any representation because they were open to the concern of the employees, and that they had dealt with a union before for the San Leandro facility, and that didn't work out.

[13] In an memorandum from Hennig to the Telegraph store crew members dated May 28, 1997, in the penultimate section of the missive, the employees were informed, if Respondent and the Union agreed on a contract:

> It is possible that you could end up with lower, better, or the same wages and benefits than what you currently have. Everything will be on the bargaining table, and there is no way to predict what will happen.

Respondent argues this missive is consistent and similar to Mizes' statements. I find this argument is unpersuasive. There is no reference to a comment "bargaining will start from zero" or "from the ground," there is no basis to conclude Mizes closely followed this document as a script, without embellishment.

[14] Her notes do not contain any reference to the Mizes statements at issue in this proceeding. The notes merely reflect the statements made by some of the employees during the meeting. Martin admitted her notes did not help in refreshing her recollection of what Mizes said during this meeting. Another reason I find Martin is not a reliable witness is she appeared to be less than forthright. For example, she denied reviewing her notes prior to testifying. Only after further cross-examination did she admit to going over her notes earlier in the week of her testimony with Respondent's counsel.

a discussion on the sidewalk. Love and Allah then entered the store and Allah said he could not believe Love was going to write him up for leaving. Mizes or Hennig asked if the meeting was to end at 9 p.m. and when informed this was correct, employees who wished to were given permission to leave. Some employees left and others stayed for a question and answer period. Martin admitted at that juncture, the meting was no longer mandatory.

As the employees were leaving, Joshua Smith,[15] a counterperson and trainer, was handing out union literature from a position just inside the door of the store.[16] Martin and Love admitted Smith was not disrupting the meeting. Love admitted these actions occurred when the employees were free to leave. Smith did hand out union materials to those employees who were leaving while the other crew members were participating in the meeting. After finishing his distribution of union literature, Smith and Love had a discussion outside of the store. According to Smith:

> We were just having miscellaneous conversation. And some separate conversation came up regarding warnings. And [Love] caught me separate from the rest of the people there, and said speaking of warnings, I need to warn you about passing out union literature.[17]

Smith did not receive a written warning or any other discipline as a result of this incident. Smith understood he was being warned by Love even though he characterized their conversation as "friendly."

D. Benefits

In January 1996 Noah's Bay Area Bagels was purchased by Boston Chicken, Inc. The purchaser then combined Noah's with Boston Chicken's other bagel franchises creating Einstein Noah's Bagel Corporation (Einstein). At the time of the purchase, Noah's had an established health benefit package (the Prudential plan). The Prudential plan offered the employees the choice of a preferred provider plan or a health maintenance organization. Under the Prudential plan, after a 90-day waiting period, all employees who worked more than 30 hours a week were eligible for either plan.

In January 1997 Respondent's parent company decided to terminate the Prudential plan and implement what was called the General American benefits plan. The General American plan was the benefit program in use for Boston Chicken and certain other Einstein shops. The change in benefit plans was announced to Respondent's employees on February 5, with an effective date of April 1.

The General American plan was generally considered by Respondent's employees to be much less desirable. The General American plan increased the number of hours required for eligibility to 35 per week, increased the waiting period and eliminated domestic partner coverage. Respondent's managers began almost immediately after the announcement to seek restoration of the benefits offered in the Prudential Plan. Mizes set a target date of June 30 as his goal for getting Einstein's to make the change for all of its employees. There is no evidence Respondent informed its employees of these efforts.

Once the General American plan was implemented, the Respondent's employees dissatisfaction was evident; one plant completely boycotted the plan. On April 10 Mizes and Gallegos persuaded their superiors to implement benefits similar to the Prudential plan. Without determining whether Prudential Insurance Company would provide such coverage, or if it could economically obtain similar coverage from Prudential or another provider, on April 11, Respondent announced to its employees, except those in the East Bay stores, that the Prudential plan would be restored.

For the East Bay stores, Respondent distributed a letter which provided:

> Noah's has decided to offer a choice of benefit plans by reinstating its prior medical, dental and vacation plans to Noah's crew members. Unfortunately, we are not able to make this change for those crew members who may be covered by a pending National Labor Relations Board case. We have sought to restore benefits for some time, and we are now able to announce the change.
>
> We regret that no change can be made for you at this time. We have been advised by our lawyer that any changes for crew members who may be involved in the NLRB case would create legal risk at this time. The law is quite clear that we are not allowed to change wages, benefits or do anything else what could be considered "buying" your votes in a possible election.
>
> Please understand that we have taken this action solely to avoid any risk of improper influence on any upcoming election. we will give you further information as soon as our situation with the NLRB case becomes clear.

The Regional Director for Region 32 ordered an election at the Telegraph store only and thereafter, on May 19 Respondent reinstated the Prudential benefits at all the East Bay district stores except the Telegraph store.

III. ANALYSIS AND CONCLUSIONS

A. April 4 Statements

Respondent argues Love's statements to the attending shift leaders on April 4 were not coercive because they were the "chief Union organizers" and purposely drew Love into the discussion. Respondent's brief implicitly admits Love ques-

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[15] Smith convincingly corroborated Wolansky and Cazares. He testified in a direct manner appearing to give complete unembellished answers. According to Smith, Mizes discussed:

> The history, the third-party influence of a union. After that, I just remember response time. . . .
>
> [Mizes] said that—the thing that stuck out most clearly in my mind is that he said we would start from zero and he touched the floor with his hand. He was in a sitting position and indicated we would start from scratch or ground zero in our negotiations. That's one thing I do recall out of that.

Smith readily admitted Mizes mentioned that with collective bargaining, the employees could end up with more, less or the same benefits and other terms and conditions of employment. Smith was clear that Mizes emphasized starting from ground zero when he discussed "the outcome of a contract negotiation." I also find it highly probable that an employee who was an open and admitted union activist at the time of this meeting would tend to recall these statements.

[16] Martin admitted Smith was distributing material "As the meeting was adjourning." She did not know if the employees were still on the clock at the time. There was no documentary evidence concerning when these employees punched out, or if, in fact, they did punch out. There was no explanation advanced for the failure to adduce timecards or other business records in support of Respondent's claim some if not all of the Telegraph store employees were still on the clock at the time Smith was distributing union literature.

[17] Cazares overheard Love inform Smith that he was not allowed to pass out any information in the store.

tioned employees about their union activities and the activities of others and instructed employees to stop other employees from engaging in union activities. As found above, Love's statements to these employees the following day that he was in error concerning their supervisory status at the time he made these statements does not constitute effective repudiation.

Only Cazares was admittedly active in the union organizing campaign. There was no evidence Love knew of the involvement of any of the shift leaders in the union organizing campaign. The fact he did not refer to any such involvement by individuals he believed to be supervisors, buttresses this conclusion. Moreover, the testimony does not support Respondent's argument the shift leaders entrapped Love or otherwise induced him to make the offending statements.

The record establishes the employees were called into a mandatory meeting with their manager in his office, informed of the union organizing effort, Love's dislike of unions and working in unionized stores, and Love persisted in continuing the meeting after the employees informed him they were not supervisors. I credit the testimony he informed the shift leaders they were to report all union organizing activity in the store, stop such activity, at all times and regardless of where in the store such activity occurred. Love signaled these employees management was adverse to unionization and was watching the employees protected activity, which tended to interfere with that activity.

Love admitted instructing the shift leaders to stop any union organizing activity they observed occurring in the store. Respondent did not claim Cazares was in error when he asserted there is a breakroom. Love did not carve out an exception to his instructions to the shift leaders concerning the breakroom or any nonwork area. He inquired if any of the shift leaders were asked to fill out union authorization cards and to stop such solicitation and report any union activity to him.

An employer's request that employees spy on the activities of other employees "constitute[s] an impermissible interference with the employees . . . Section 7 rights and violates Section 8(a)(1) of the Act." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981). I conclude Love informed the shift leaders that Respondent would not tolerate unionizing activity. Respondent proffered no legitimate basis for the questioning, communicated no lawful reasons for the questioning ,and did not offer the employees any assurance against reprisals. Thus, Love's statements and instructions were more than mere requests the shift leaders report observable union activities, they were instructed to stop it and embark on an intelligence gathering program, all to discourage employees from seeking union representation.

Love's statements to the shift leaders were clearly coercive, directing them to actively prevent unionization, a state he told them he abhored, in violation of Section 8(a)(1) of the Act. *Belcher Towing Co.,* 265 NLRB 1258 (1982). Love's belief the shift leaders were supervisors at the time he made these comments is not an exculpatory factor. *Save-On Drugs*, 253 NLRB 816, 820–821 (1980), enfd. 728 F.2d 1254 (9th Cir. 1984); and *Shelby Memorial Home*, 305 NLRB 910 fn. 2 (1991). ("An employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act.")

B. Events of April 15

1. Mizes' statements

I find Mizes, on April 15, informed the employees bargaining would start from zero and/or from the ground, repeated the comment and emphasized it with gestures. I also find Mizes informed the employees collective bargaining could result in their receiving less, more or the same wages and other terms and conditions of employment. As was noted in *Belcher Towing Co.,* supra, 265 NLRB at 1268:

> Neither the Employer, the Union, nor the employees are guaranteed their hearts' desire in bargaining about wages, hours, and conditions of employment. Collective bargaining is a process, not a panacea, and an employer may properly point out the hazards to its employees. Bargaining may start from 'scratch' or 'zero' and the employees may be so informed by their employer lawfully prior to an election. *Wagner Industrial Products Co.,* 170 NLRB 1413 (1968); *Host International Inn*, 195 NLRB 348 (1972); provided the employer's statements to its employees are not made in a coercive context or in such a manner as to convey to its employees a threat that they will be deprived of existing benefits if they select a union to represent them. *Coach & Equipment Sales Corp.*, 228 NLRB 440 (1977); *Madison Kipp Co.*, 240 NLRB 879 (1979); and *South Hills Health System*, 240 NLRB 69, 76 (1979).

In the circumstances of this case, I find Mizes' comments to employees during a captive audience speech to be a coercive threat they will receive less favorable wages or other terms and conditions of employment if they selected the Union as their collective-bargaining representative. Mizes' statement left employees with the impression seeking representation resulted in a threat of the loss of existing benefits. After implementing a less favorable benefit plan, Respondent revealed on April 11, that all but the East Bay stores employees would have the Prudential Plan benefits restored. Respondent tied the restoration of benefits to freedom from union organizing based on advice all employees potentially involved in the NLRB case "cannot be given the benefits because it would "create a legal risk."

The Board in *Noah's New York Bagels, Inc.*, 324 NLRB 266 (1997), found a similar statement by one of Respondent's representative violative of the Act; citing *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 810 F.2d 638 (9th Cir. 1982), as follows:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

Mizes' statements to the Telegraph store employees several days after announcing they would not have their prior benefits reinstated gave the impression they will be "deprived of existing benefits if they select a union to represent them." *Belcher Towing Co.,* supra. Mizes did later indicate negotiations could result in greater as well as lesser benefits, but these later statements did not

cure Mizes' statement bargaining would "start from ground zero" which could reasonable be construed as indicating the Telegraph store employees benefits would be less than the other employees, a situation which could only be rectified if they rejected the Union or the Union after negotiations was able to restore them.

Moreover, less than 2 weeks earlier, Love informed the three shift leaders they were to advance Respondent's antiunion organizing campaign, interrogated them about their own and other employees' union activities, and instructed them to stop other employees who were engaging in union activities in the store. By Mizes' conduct, Respondent violated Section 8(a)(1) of the Act.

2. Love's warning to Smith

I find Love's comments to Smith concerning distributing union material inside the public area of the store did not violate the Act. This allegation of the complaint should be dismissed. Respondent had a valid no-solicitation, no-distribution rule in its employee handbook. Smith clearly was standing inside the store when he was distributing union material. The employees were apparently being paid for their attendance at the meeting, so they were on the clock. There is no evidence the rule was disparately applied to Smith. Smith was not disciplined, only warned he was violating a valid company rule.

I find the General Counsel's argument that the meeting was posted to end at a certain time and so the employees were free to leave requiring a finding that the meeting was over, to be without merit. Some employees chose to remain and continue meeting with Respondent's representatives. The undisputed testimony is those employees who chose to stay were compensated for this time. Therefore, the efficacy of the no-solicitation/no-distribution rule was not abrogated by the announcement employees who wanted to leave the meeting could. All employees did not leave, thus, the Company meeting continued and those employees who remained were on the clock. In this situation, Love's comments to Smith were not violative of the Act.

I also find the record fails to establish Love unlawfully interrogated any employee on this date. I therefore, recommend the allegations Respondent, by Love, violated the Act by threatening discipline and interrogating an employee be dismissed.

C. Benefits

The General Counsel argues it was unlawful for Respondent to withhold benefits from the Telegraph store employees during the pendency of the representation petition because its actions were motivated by the pending election. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); and *Progressive Supermarkets,* 259 NLRB 512 (1980).

Respondent argues since the benefit was not announced or scheduled at the time the representation petition was filed, it was obligated to avoid the appearance of election impropriety the granting of such benefits to the Telegraph store employees would raise, particularly where, as here, Respondent informs the employees of the reason for its decision is "to avoid the appearance of election impropriety." *Martin Industries,* 290 NLRB 857 (1988); *Uarco Inc.*, 169 NLRB 1153 (1968).

In *Noah's New York Bagels*, supra at 271, 272, Administrative Law Judge Pollack reviewed the law relating to granting such benefits, as follows:

> It is well settled that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering*, 253 NLRB 419, 421 (1980). The Board's general Rule is that an employer's legal duty during a preelection campaign period is to proceed with the granting of benefits, just as it would have done had the union not been on the scene. See, e.g., *American Telecommunications Corp.*, 249 NLRB 1135 (1980). Thus, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. *Liberty House Nursing home*, 236 NLRB 50 (1978). However, where employees are told expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference, the Board will not find a violation. *Truss-Span Co.*, 236 NLRB 50 (1978).
>
> . . . .
>
> The Board does not automatically find the granting of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectionable "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting Goods*, 239 NLRB 1277 (1979). However, the withholding of new benefits from employees who are awaiting a Board election also violates the Act if the employees otherwise would have been granted the increases in the normal course of the employer's business. *Progressive Supermarkets*, 259 NLRB 512 (1981). An employer is obligated to give any increase or benefit decided upon, or any regular, normal increase that would come due during the critical period, but should not put into effect any increase not already decided upon before the union came on the scene. The more prudent course, the one least likely to result in a violation, is to refrain from giving the wage increases during that period, for at the very least the General Counsel would have the burden of showing the normalcy of the increase, or that it had been decided upon prior to the advent of the union. *Liberty Telephone Communications*, 204 NLRB 317, 322 (1973).

As held in *Florida Steel Corp.,* 220 NLRB 1201, 1203 (1975):

> The Board and courts have long held that an employer withholding pay raises and/or benefits from employees who are awaiting the holding of a Board election, or have chosen a union as their bargaining representative, has violated the Act if the employees otherwise would have been granted the pay raises and/or benefits in the normal course of the employers business. *Dan Howard Mfg. Co. & Dan Howard Sportswear, Inc.*, 158 NLRB 805 (1966); and *McCormick Longmedow Stone Co., Inc.*, 158 NLRB 1237 (1966). [Remainder of citations omitted.]

The Board found in *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1985): "If, as here, in the normal course of events, a change of benefits would have occurred, the mere pendency of a question concerning representative does not impede the implementation of the change and an employer who withholds such a change due to the union's presence violates the Act. *Montgomery Ward & Co.*, 225 NLRB 112 (1976)." Cf. *H.S.M. Machine Works*, 284 NLRB 1482, 1483 (1987).

While it is clear Respondent did not regularly restore benefits, it must establish the legitimacy of its business reason. Respondent's reasons for the announcement during the pendency of a representation petition is determinative of the legality of its

action. The Supreme Court found "that the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union" interfere with those employees rights protected by Section 7 of the Act to organize. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

I find Respondent would have bestowed the Prudential benefits on the Telegraph store employees but for the pendency of the representation election. I further find Respondent failed to demonstrate the need to implement the change during this time. While Gallegos admitted the prospect of such a quick restoration of the Prudential benefits was unlikely. There was no demonstration any personnel or other business problems occurred as a result of the elimination of the Prudential benefits. Respondent, by Gallegos, admitted just a few days after the representation petition was filed, he related the employees unhappiness with the new benefit package as part of the discussion where he and Mizes tried to convince their superiors of the need to restore those benefits.

In these circumstances, I find Respondent decided "whether or not to grant improvements in wages and other benefits in the same manner as it would absent the presence of the union." *McCormick Longmeadow Stone Co*., 158 NLRB 1237, 1241 (1966); quoting *Champion Pneumatic Machinery Co.*, 152 NLRB 300, 306–307 (1965). If the employer withheld these benefits from the Telegraph store employees or established by the testimony of the decision makers who approved the change, including the timing of the announcement for all the other employees that such change was not influenced by the presence of the union at the East Bay store , then Respondent's action would not violate the Act. *Wintex Knitting Mills, Inc.*, 216 NLRB 1058, 1059 (1975). Respondent failed to establish it had to announce the change for all but the Telegraph store employees about 6 days after the Union filed its representation petition.

Respondent failed to advance any compelling reasons for immediate action absent the pending representation election. While its San Leandro plant employees boycotted the new health plan, there was no evidence such action had any economic or other effect warranting immediate action. As noted in *Kinney Drugs*, 314 NLRB 296, 304 (1994): "In sum, no reason is evident as to why this discretionary act was not deferred for the relatively brief period that would have prevented undue advantage in the impending election." Here, the employer clearly altered its course because of the presence of the Union. Otherwise, if the grant of benefits was for reasons unrelated to union organization, the grant would clearly be consonant with the Act and Respondent could have conferred the benefits upon the Telegraph store employees without fear of violating the Act. *McCormick Longmeadow Stone Co.,* supra.

Supporting this conclusion is the precipitous nature of Respondent's actions. Having received approval, Respondent immediately announced its plans to restore the Prudential benefits for all employees except those it considered involved in the pending representation election. This announcement was made prior to contacting Prudential or any other insurance company to insure these benefits could be offered. Respondent also did not know the cost of the announced change, thus, economic exigencies were not even shown to be a consideration. Further buttressing this conclusion is the admission of Gallegos that during the conversation in which Respondent decided to restore the Prudential benefits, the nacient union organizing drive was discussed.

Unlike the previously cited *Noah's* decision, Respondent was not deferring a previously announced action, here, there was no expected benefit. Compare *Uarco Inc.*, 169 NLRB 1153 (1968); *Noah's New York Bagels*, supra. The restoration of the Prudential benefits was not clearly established by Respondent to be the withholding of an expected benefit. On the contrary, it was a benefit whose planned conferral was announced prior to ascertaining whether it could be economically and timely acquired.

The Board noted in *Baltimore Catering Co.*, 148 NLRB 970, 973 (1964), and has followed to date:

> In the absence of evidence demonstrating that the timing of the announcement of changes in benefits was governed by factors other than the pendency of the election, the Board will regard interference with employee freedom of choice as the motivating factor. The burden of establishing a justifiable motive remains with the Employer.

The record requires the conclusion the General Counsel established the timing of the benefit was governed by the pending election and but for such election, the Telegraph store employees would have received the restored benefits and the normalcy of the Respondent's actions was placed into question without convincing refutation. Moreover, I find the employer failed to meet its burden it was following established practice or other business exigencies required the immediate announcement of the restoration of the Prudential benefits prior to the union election. Respondent did not demonstrate it had an established practice of immediately announcing any or all planNed benefit changes prior to determining their availability or cost. I find "it was the arrival of the Union that jolted Respondent [Noah's] into prompt action." *Employer Management* Services, 324 NLRB 1051 (1997). In these circumstances, I conclude Respondent violated Section 8(a)(3) and (1) of the Act by withholding the Prudential benefits from the Telegraph store employees pending the union election.

CONCLUSIONS OF LAW

1. The Respondent, Noah's Pacific, LLC f/k/a Noah's Bay Area Bagels, LLC a/k/a Noah's Bagels, is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food & Commercial Workers Union, Local 870, United Food & Commercial Workers International Union, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by questioning employees about their union activities and the union activities of other employees; instructing employees to stop the union activities of other employees; and, by threatening employees that if they selected the Union as their collective-bargaining representative, bargaining would "start at zero" and/or "from the ground," under circumstances which inferred employees would lose benefits if they supported the Union.

4. By announcing it was withholding medical and other benefits from the Telegraph store employees during the pendency of a representation election for the purpose of discouraging union support and inducing the employees to vote against the Union, Respondent has interfered with the employees' exercise of Section 7 rights in violation of Section 8(a)(3) and (1) of the Act.

5. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

6. In all other respects alleged in the complaint, the General Counsel has failed to establish Respondent violated the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having discriminatorily denied benefits to its Telegraph store employees, Respondent must make whole the Telegraph store employees for any and all losses of earning and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in *Ogle Protection Service*, 283 NLRB 682 (1970) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Noah's Bay Area Babels, LLC, Berkeley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withholding medical and other benefits that were not expected or reasonably scheduled from the Telegraph store employees during the pendency of a representation election for the purpose of discouraging union support and inducing the employees to vote against the Union.

(b) Interfering with, restraining, and coercing its employees in the exercise of their rights under Section 7 of the Act by questioning employees about their union activities and the union activities of other employees; instructing employees to stop the union activities of other employees; and, by threatening employees that if they selected the Union as their collective-bargaining representative, bargaining would "start at zero" and/or "from the ground," under circumstances which inferred employees would lose benefits if they supported the Union.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer the Telegraph store unit employees the same medical and other benefits granted its other counterpersons, cooks, and other staff in similar positions or, if those benefits no longer exist, substantially equivalent benefits, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earning and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the nature and extent of the remedy due under the terms of this order.

(c) Within 14 days after service by the Regional Director, post at its Telegraph store, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all placeS wHere notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 2, 1994.

(d) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint allegations not specifically found here, be dismissed.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."